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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

10 SAN JOSE DIVISION

11 IN RE INTUITIVE SURGICAL) Lead Case No. 5-14-CV-00515-EJD
12 SHAREHOLDER DERIVATIVE)
13 LITIGATION)
14 _____) ADMINISTRATIVE MOTION FOR ORDER
This Document Relates To:) ADVANCING DATE FOR CASE
15 ALL ACTIONS.) MANAGEMENT CONFERENCE
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1 **I. INTRODUCTION**

2 Plaintiffs hereby move, pursuant to Civ. L.R. 7-11, to advance the Case Management
 3 Conference currently set for May 14, 2015 (the “CMC”) in the above-captioned action (the
 4 “Action”). Plaintiffs respectfully submit that the CMC should be advanced to April 23, April 30,
 5 May 7, or any alternative earlier date that the Court is able to accommodate.¹ The legal authority
 6 addressed herein demonstrates that demand was futile as to the derivative claims asserted in the
 7 Action on behalf of Nominal Defendant Intuitive Surgical, Inc. (“Intuitive” or the “Company”).
 8 Because demand was futile, and no other purported basis for dismissal was advanced, discovery
 9 should proceed immediately to avoid undue prejudice to Plaintiffs.

10 Specifically, expediting the CMC so that the Court may entertain the parties’ respective case
 11 management plans and discovery schedules will provide a meaningful opportunity to coordinate
 12 discovery in the Action with that currently ongoing in the related securities fraud class action that is
 13 also pending before this Court, captioned *In re Intuitive Surgical Securities Litigation*, No. 5:13-CV-
 14 01920 EJD (the “Class Action”). Coordination is now more important than ever, as the complaint in
 15 another derivative case asserted on behalf of Intuitive – *Public School Teachers’ Pension and*
 16 *Retirement Fund of Chicago v. Guthart*, Case No. CIV-526930 (the “State Action”) – was recently
 17 sustained in the Superior Court for the State of California, In and For the County of San Mateo (the
 18 “State Court”).² Because discovery is proceeding in this Court in the Class Action, Plaintiffs remain
 19 of the view that this Court is the most appropriate to litigate all claims related to the issues raised in
 20 Plaintiffs’ complaint. Moreover, Plaintiffs have been and remain willing to coordinate with the State
 21 Court plaintiffs. A prompt CMC will help ensure that Plaintiffs’ claims are not prejudiced through
 22 delay.

23 ¹ As is detailed in the concurrently filed Herkenhoff Declaration, counsel for all parties to the
 24 Action are able to participate in the CMC on the foregoing dates.

25 ² On June 25, 2014, this Court remanded the State Action to the State Court following
 26 Defendants’ removal. Defendants subsequently moved to stay the State Action in favor of this
 27 earlier-filed and substantially similar Action, but the State Court denied the Defendants’ stay motion.
 28 Defendants then petitioned for a writ of mandate in the Intermediate Court of Appeal. After granting
 an immediate stay and accepting briefing on the matter, the Intermediate Court of Appeal
 subsequently denied the Defendants’ petition. Defendants therefore filed their demurrer in the State
 Action on January 20, 2015.

1 **II. ARGUMENT**

2 On April 6, 2015, Plaintiffs filed a Statement of Recent Decision (the “Supplemental
 3 Authority”) in opposition to Defendants’ pending Motion to Dismiss (the “Motion to Dismiss”) in
 4 the Action.³ *See* ECF Dkt. No. 78. The Supplemental Authority consists of a Memorandum
 5 Decision and Order on Demurrer (the “State Court Order”) issued on March 27, 2015 in the State
 6 Action. *Id.* Per the State Court Order, the State Court concluded that pre-suit demand on Intuitive’s
 7 Board of Directors (the “Board”) was futile. *See id.* at Exhibit A.

8 Respectfully, as a threshold matter, the Motion to Dismiss in the instant Action should be
 9 denied and this Action should proceed based on issue preclusion principles. Federal courts across
 10 the country have repeatedly recognized that a ruling as to whether pre-suit demand was required
 11 upon a board of directors in a related derivative proceeding precludes the re-litigation of that same
 12 issue. *See, e.g., In re Sonus Networks, Inc. S’holder Deriv. Litig.*, 422 F. Supp. 2d 281, 284 (D.
 13 Mass. 2006) (holding that ruling on demand futility under Delaware law in parallel derivative
 14 proceeding precluded the re-litigation of the question of demand futility), *aff’d*, 499 F.3d 47 (1st Cir.
 15 2007); *Henik v. LaBranche*, 433 F. Supp. 2d 372, 381 (S.D.N.Y. 2006) (determination regarding
 16 demand futility under Delaware law in “an almost identical action” precluded re-litigation of demand
 17 futility); *Hanson v. Odyssey Healthcare, Inc.*, 2007 WL 5186795 (N.D. Tex. Sept. 21, 2007) (same,
 18 and stating that “Judge Murphy’s ruling is binding on this Court as to the issue of demand futility.”);
 19 *LeBoyer v. Greenspan*, 2007 WL 4287646, at *1 (C.D. Cal. June 12, 2007) (same).⁴ Because the
 20 Motion to Dismiss is based solely on Defendants’ contention that pre-suit demand on the Board was
 21 required under Delaware law, and the State Court Order expressly rejected that contention, it is

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 25 ³ The Motion to Dismiss was filed on September 12, 2014 and briefing in connection with the
 26 Motion to Dismiss was completed on October 30, 2014. A hearing was scheduled to take place on
 27 January 22, 2015, but on January 14, 2015 the Court took the Motion to Dismiss under submission
 28 without oral argument. The Motion to Dismiss remains ripe for adjudication.

29 ⁴ *See also Holt v. Golden*, 880 F. Supp.2d 199 (D. Mass. 2012) (ruling on demand futility in
 30 parallel derivative proceeding precluded re-litigation of the same issue); *Arduini v. Hart*, 2012 WL
 31 893874 (D. Nev. Mar. 14, 2012), *aff’d*, 774 F.3d 622 (9th Cir. 2014) (same).

1 Plaintiffs' position that Defendants are bound by the State Court Order and their Motion to Dismiss
 2 must be denied.⁵

3 Further, Plaintiffs respectfully submit that discovery in this Action should commence
 4 immediately and be coordinated with the related Class Action.⁶ Because discovery has begun there
 5 and, in Plaintiffs' view, preclusive authority has resolved the pre-suit demand issue, coordination
 6 serves both the Court's and the parties' interests in efficiency and judicial economy.⁷ *See, e.g., In re*
 7 *Galena Biopharma Inc. Derivative Litig.*, 2015 WL 454868 (D. Or. Feb. 4, 2015) ("it is more
 8 efficient for Galena to litigate the securities class action and the derivative cases simultaneously.
 9 Both cases are before the same judge in the same court, and discovery issues can be resolved in a
 10 consistent manner."); *Smith ex. rel. Apollo Group, Inc. v. Sperling*, 2012 WL 79237, at *3 (D. Ariz.
 11 Jan. 11, 2012) (finding that where related class and derivative actions were pending before the same
 12 court, "allowing the two actions to proceed at the same time will actually conserve Apollo's
 13 financial resources ... Apollo could request that the Court consolidate discovery in both actions and
 14 avoid unnecessary duplicative discovery and expenditure of financial resources that would occur if
 15 Apollo had to engage in discovery on the same issues more than once.").

16 Moreover, as the parties to this Action advised this Court in a Joint Case Management
 17 Statement filed on February 19, 2015 (see ECF Dkt. No. 75), the State Court has already expressed

18 ⁵ Defendants did not move to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). In view of the fact
 19 that demand has now been deemed futile in a decision binding on Intuitive and the defendants, there
 20 is no basis to now litigate whether actionable claims are stated. *See In re Atmel Corp. Derivative*
 21 *Litig.*, No. 06-4592, 2008 WL 2561957, at *9 (N.D. Cal. June 25, 2008) ("[C]ourts have held that
 22 where a plaintiff has alleged facts sufficient to prove demand futility they have also satisfied the
 23 burden under Rule 12(b)(6).").

24 ⁶ As this Court is aware, the parties to the instant Action submitted a Joint Case Management
 25 Statement on September 30, 2014. Therein, Defendants opposed Plaintiffs' contention that
 26 discovery should commence, arguing that "discovery should await a resolution on the demand-
 27 futility issue." On October 7, 2014, this Court entered an Order staying disclosure and discovery
 28 until further Order of the Court.

25 ⁷ The defendants' motion to dismiss in the Class Action was denied in substantial part on
 26 August 21, 2014. The defendants in the Class Action subsequently filed a motion for
 27 reconsideration, and discovery in the Class Action was stayed while the motion for reconsideration
 28 was pending. On December 15, 2014, however, the defendants' reconsideration motion was denied
 and the discovery stay was accordingly lifted. On January 5, 2015, this Court entered a case
 management conference order in the Class Action providing that discovery on all issues should
 commence, and setting a fact discovery deadline of December 15, 2015.

1 an interest in coordinating the substantially similar State Action with this earlier-filed Action, and
 2 Plaintiffs in this Action have both stated and clearly demonstrated all along that they are willing and
 3 able to so coordinate their efforts with others.⁸

4 As also stated in the most recent Joint Case Management Statement filed with this Court on
 5 February 19, 2015, “[t]he parties flag the State Court Action for the Court because of the potential
 6 for conflicting judgments, incompatible discovery and case management orders, and the risk of
 7 duplicative and wasteful litigation.” *Id.* Plaintiffs respectfully submit that in light of: (a) the fact
 8 that discovery in the related Class Action is already proceeding before this Court, and (b) the recent
 9 State Court Order, it would be in the best interests of all of the parties, especially the Company, for
 10 discovery efforts and the litigation of all derivative claims brought for the benefit of Intuitive to
 11 proceed exclusively before this Court, and be appropriately coordinated with the plaintiff and
 12 plaintiff’s counsel in the State Action.

13 **III. CONCLUSION**

14 For the reasons stated herein, Plaintiffs respectfully request that the instant Motion be granted
 15 and that the Case Management Conference be advanced to the earliest possible date.

16 DATED: April 13, 2015

THE WEISER LAW FIRM, P.C.
 KATHLEEN A. HERKENHOFF (168562)

s/ KATHLEEN A. HERKENHOFF
 KATHLEEN A. HERKENHOFF

22 ⁸ Indeed, on July 30, 2014, in appointing Robert Berg and The Weiser Law Firm, P.C. (the
 23 “Weiser Firm”) as lead plaintiff and lead counsel, respectively, this Court recognized that “Berg has
 24 made the most concerted effort to be inclusive of the other plaintiffs in this case by suggesting on
 25 multiple occasions joint prosecution and a co-plaintiff leadership structure. Because Berg has made
 26 a consistent effort to move the case forward in an inclusive manner, the court finds that this factor
 27 weighs in favor of appointment of Berg as lead plaintiff.” Less than two weeks later, in August
 28 2014, the Weiser Firm informed this Court that it had communicated with the law firms of Grant &
 Eisenhofer, P.A. and Bernstein Litowitz Berger & Grossmann LLP, then serving as co-lead counsel
 in a substantially similar derivative action brought on behalf of the Company in the Delaware Court
 of Chancery, and that in the interests of efficiency and judicial economy the firms agreed to
 cooperate and coordinate their efforts on the Company’s behalf in the Action while the case in the
 Delaware Court of Chancery would be stayed.

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CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2015, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on April 13, 2015.

s/ KATHLEEN A. HERKENHOFF
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